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ECORDS
AND
BRIEFS

No. 05-1161

Supreme Court, U.S.
FILED
MAR 2 9 2006
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IN THE
SUPREME COURT OF THE UNITED STATES

IRVING A. GELB,

Petitioner,

-against-

NEW YORK CITY BOARD OF ELECTIONS, et al.,

-and-

NEW YORK STATE BOARD OF ELECTIONS, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CITY RESPONDENTS' BRIEF IN OPPOSITION

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March 28, 2006

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COUNTER STATEMENT OF THE QUESTIONS PRESENTED

Did the United States Court of Appeals for the Second Circuit correctly affirm the thorough and well-reasoned District Court opinion, which dismissed petitioner's complaint and held that the City Board did not violate petitioner's equal protection or due process rights, because he failed to demonstrate that the City Board purposefully and intentionally discriminated against him as a write-in candidate and voter?

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No. 05-1161

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IRVING A. GELB,

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-and-

THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK, et al.,

Respondents.

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CITY RESPONDENTS' BRIEF IN OPPOSITION

In this 42 U.S.C. §1983 action, *pro se* petitioner, Irving A. Gelb ("petitioner"), alleges that respondents, the Board of Elections of the City of New York and its Commissioners ("the City Board"), as well as the Board of Elections of the State of New York and its Commissioners ("the State Board"), violated his First and Fourteenth Amendment rights by denying him, as a voter and as a candidate, and others the right to vote by write-in ballot in the September 2000 Democratic Party primary election for

the United States Senate. This lawsuit is petitioner's third against the City Board and his first against the State Board.

City respondents request that this Court deny the petition for a writ of certiorari seeking review of the Second Circuit's September 29, 2005 unanimous, unreported summary order in this case. This is because the order below does not conflict with a decision of this Court or another court of appeals on any question petitioner attempts to formulate. Nor does the petition otherwise properly raise any other issue calling for this Court's exercise of its supervisory power.

COUNTER STATEMENT OF FACTS

Background to this Action

(1)

Petitioner's First Lawsuit Regarding the 1993 Democratic Party Primary and General Elections for Bronx Borough President

In 1993, petitioner campaigned to be nominated by the Democratic Party for the office of Bronx Borough President. Petitioner submitted a designating petition to have his name placed on the primary ballot, as required by section 6-118 of the New York Election Law, however, the incumbent successfully challenged the petition. As such, petitioner's name was removed from the ballot. Undeterred, petitioner continued his campaign by running in the primary and general elections as a write-in candidate.

In 1994, petitioner filed suit against the City Board seeking injunctive relief and compensatory and punitive damages ("*Gelb I*"). Petitioner alleged that his First and Fourteenth Amendment constitutional rights and state law rights under the New York Election Law were violated in that voters were not informed of their right to cast a write-

in vote nor were provided with the means to cast those votes. Petitioner claimed that there were also several ballot and voting booth irregularities during both the 1993 primary and general elections.

(a)

Prior to submitting its answer, the City Board filed a motion to dismiss for failure to state a cause of action pursuant to Fed. R. Civ. P. 12(b)(6). In an order entered March 29, 1995, the United States District Court for the Southern District of New York (Sotomayor, U.S.D.J.), denied the motion and also declined the City's request to abstain from hearing the case on the ground that there was an ambiguity in the New York Election Law as to whether there is a right to vote by write-in in all primary elections. 888 F. Supp. 509; 517-519. Specifically, the District Court held that petitioner sufficiently stated a Due Process and Equal Protection claim under 42 U.S.C. section 1983 to survive a motion to dismiss in that, reading the *pro se* papers liberally and fairly, petitioner did allege that the City Board acted intentionally in denying petitioner his right to vote and run by write-in. *Id.* at 516-517.

With respect to abstaining from deciding the federal constitutional issues, the City Board had contended that New York Election Law section 6-164 did not permit write-in voting in contested primary elections absent a valid opportunity to ballot petition. That section, titled "Primary, uncontested; opportunity to ballot," provides in relevant part that party voters "equal in number to at least the number of signers required to designate a candidate for such office or position . . . may file . . . a petition requesting an opportunity to write in the name of a candidate or candidates, who need not be specified, for such office or position." As the Second Circuit noted in Gelb's second lawsuit, "the filing of a valid petition for opportunity to ballot, i.e., a petition for write-in voting,

turns an uncontested primary election into a contested one." 224 F.3d at 156.

However, the District Court held that it would not abstain, finding that the New York Election Law pertaining to the opportunity to cast write-in votes in primary elections was not ambiguous, going so far as to opine that "[t]he right to write-in candidates during a primary election may be more settled than [the City Board] believe[s]." 888 F. Supp. at 519-520; 519, n.6. The Court pointed to the plain language of the statutes as well as an August 28, 1963 opinion of the New York State Attorney General, who found that there was a right to write-in voting in all primary elections. *Id.* at 519.

(b)

After discovery was complete, both petitioner and the City Board moved for summary judgment. In an order entered December 5, 1996, the Southern District (Sotomayor, U.S.D.J.), denied petitioner's motion, granted the City Board's motion and dismissed the complaint in its entirety. 950 F. Supp. 82. The District Court held that the imperfections in the election process alleged by petitioner did not rise to the level of a federal constitutional violation, because none rendered either election "so pervasively unfair as to require a federal remedy under the due process clause." *Id.* at 85. In addition, notwithstanding the Court's earlier "finding" on the City Board's motion to dismiss, the Court now noted that "there is great uncertainty within state law as to whether a write-in option must be provided in a primary election." *Id.* at 85, n.3.

The District Court also held that petitioner did not demonstrate that the City Board acted intentionally to discriminate against write-in voters or candidates and, thus, his Equal Protection claim could not be sustained. 950 F. Supp. at 86.

Finally, the District Court held that, because no federal constitutional violation existed and because all federal law claims were eliminated before trial, it would "relinquish jurisdiction" over petitioner's state law claims. 950 F. Supp. at 86-87.

(c)

Petitioner thereafter appealed (Second Circuit Docket No.: 97-7077). In a summary order entered October 3, 1997, the Second Circuit unanimously affirmed the District Court's dismissal of petitioner's first complaint. 125 F.3d 843.

(2)

Petitioner's Second Lawsuit Regarding the 1997 Democratic Party Primary and General Elections for Bronx Borough President

Petitioner again campaigned for Bronx Borough President as a write-in candidate in the 1997 Democratic Party primary election. In this second lawsuit against the City Board under 42 U.S.C. section 1983 that alleged similar Due Process and Equal Protection claims as in *Gelb I* and sought injunctive relief and damages ("*Gelb II*"), petitioner claimed that the City Board failed to provide instructions on how voters might write-in candidates for the 1997 primary as well as in the 1993 through 1996 primaries. Petitioner also alleged that the City Board's failures carried over in the 1997 general election. Additionally, petitioner claimed that the write-in votes were not properly counted in the 1997 general election nor in prior elections.

(a)

The City Board moved to dismiss petitioner's complaint pursuant to Fed R. Civ. P. 12(b)(6) for failure to

state a cause of action and on collateral estoppel grounds. In an order entered July 19, 1998, the Southern District of New York (Baer, U.S.D.J.), denied the motion, holding that (1) the issues in *Gelb I* were not identical to the issues in this case, because "[t]he claims in *Gelb I* solely concerned the 1993 election, while the claims here allege a pattern of repeated violations leading up to and including the primary and general election of 1997" and because the issue of "pattern of omissions" was not "actually litigated" in *Gelb I*; and that (2) "at least at this stage in the litigation" and "at this juncture," petitioner's allegations "breath[ed] life . . . into his Equal Protection claims" as well as his Due Process claims. 1998 U.S. Dist. LEXIS 10240, at **12-15; 21.

(b)

Thereafter, petitioner moved and the City Board cross-moved for summary judgment. In an order entered September 30, 1997, the Southern District (Baer, U.S.D.J.), denied petitioner's motion and granted the City Board's cross-motion, thereby dismissing the complaint. 71 F. Supp. 2d 259. As in *Gelb I*, the Court here held that petitioner did not have a valid Due Process claim, because he did not offer any evidence that the City Board's procedures and policies were "pervasively unfair" in that they prevented him or any voter from casting a write-in vote and in that such procedures had an adverse impact on the outcome of the 1997 elections. . *Id.* at 267. Additionally, the Court held that petitioner failed to offer any evidence that the 1997 elections were conducted any differently than the 1993 elections, which were found to be constitutional in the first lawsuit. *Id.* Further, the Court held that petitioner had an adequate state law remedy under the New York Election Law to "air" his electoral grievances. *Id.*

As to petitioner's Equal Protection claim, the District Court again held that petitioner failed to

demonstrate that the City Board intended to deprive him of his right to vote by write-in ballot or to be a write-in candidate. 71 F. Supp. 2d at 268. The Court pointed out that petitioner did not and could not dispute that write-in ballots were offered in all general elections. *Id.*

With respect to primary elections, the District Court noted that petitioner conceded that the City Board offered write-in voting in such elections where a valid opportunity to ballot petition was filed. 71 F. Supp. 2d at 268. The Court added that, even though the City Board "has continued to apply its (legal) interpretation of New York Election Law § 6-164 [no write-in voting in contested primary elections absent a valid opportunity to ballot petition] despite Petitioner's protestations in *Gelb I*, [this] demonstrates, perhaps, that the Board's actions were not the result of inadvertence. It does not make them illegal. Mere willfulness, without the specific intent to deprive Petitioner of a fundamental right, is insufficient to establish an Equal Protection claim." *Id.* Indeed, the Court pointed out that neither Justice Sotomayor in 1996 nor the Second Circuit in 1997 ruled on whether the City Board's interpretation was correct and that the District Court noted that there was great uncertainty within state law as to whether write-in options must be provided in a primary election. *Id.* at n.19.

Finally, since the District Court eliminated all of petitioner's federal claims, as in *Gelb I*, the Court dismissed petitioner's state law claims. 71 F. Supp. 2d at 269.

(c)

Thereafter, petitioner appealed (Second Circuit Docket No.: 99-9369). In an order entered August 22, 2000, the Second Circuit found merit only to petitioner's claims relating to primary elections to the extent that he might have been unconstitutionally barred from the write-in

voting process as a voter and candidate because of the City Board's "continuing refusal to allow write-in voting in the absence of a petition for opportunity to ballot." 224 F.3d 149, 153. The Second Circuit recognized that there was uncertainty in the New York Election Law on this issue, specifically, whether write-in voting was impermissible in the absence of a valid petition for opportunity to ballot even though there were two or more candidates and a primary was therefore contested and would be held in any case. Thus, the Second Circuit certified to the New York State Court of Appeals the following question: "Is write-in voting available to an enrolled party voter in a contested primary election where no timely petition for opportunity to ballot has been filed?" *Id.* at 158.

In so certifying to the New York State Court of Appeals, the Second Circuit added that "it may well be that the [City] Board engaged in arbitrary, purposeful and intentional discrimination." 224 F.3d at 157. However, the Second Circuit cautioned that it did not "foreclose the possibility of ultimate summary judgment in favor of the City Board . . . ." *Id.*

In an order entered September 14, 2000, the New York State Court of Appeals accepted the certified question. 95 NY2d 879.

(d)

In its January 2001 brief to the New York State Court of Appeals, the City Board stated that it was "constrained to conclude after further review that our previously held position that write-in ballots are not mandated in contested primaries absent the filing of an opportunity to ballot is incorrect." The City Board, therefore, concluded that the certified question should be answered in the affirmative.

In an order entered February 20, 2001, the New York State Court Appeals held that, in light of the change in the City Board's legal position following the certification, "it would be inappropriate for this Court to answer the question certified." 96 NY2d 748, 749. In declining to answer the certified question, the Court of Appeals however specifically did not "pass[] on the legal correctness of" the City Board's new view of the New York Election Law. *Id.*

(e)

Thereafter, in light of the City Board's change in position and the New York State Court of Appeals' refusal to answer the certified question, the Second Circuit vacated the District Court's grant of summary judgment and remanded the matter for the District Court to determine whether the City Board engaged in "intentional or purposeful discrimination." 7 Fed. Appx. 97, 2001 U.S. App. LEXIS 5647 (2001).

Upon remand, the matter proceeded to trial on July 10 and July 11, 2001, which resulted in a jury verdict in favor of the City Board. 47 Fed. Appx. 10, 2002 U.S. App. LEXIS 18688, at *2. The jury found that petitioner failed to prove that the City Board had intentionally discriminated against him by not offering write-in voting in the September 1997 Democratic Party primary election.

Petitioner thereafter appealed claiming that the jury was improperly charged on intentional discrimination and that the District Court erred in excluding certain evidence. 47 Fed. Appx. 10, 2002 U.S. App. LEXIS 18688, *2 (Second Circuit Docket No.: 01-9116). In an order entered September 10, 2002, this Court unanimously affirmed the jury's verdict. *Id.*

This Action

(1)

On August 21, 2000, one day before the Second Circuit certified its question to the New York State Court of Appeals, petitioner commenced this, his third action against the City Board, in the Eastern District of New York. Petitioner alleged an Equal Protection violation in that he and other voters in the City of New York would be denied the right to vote by write-in in the September 2000 Democratic Party primary election for the United States Senate, while voters outside the City would be permitted to do so. Petitioner claimed that the City Board was aware in 1993 of its obligation to provide write-in balloting in contested primaries, since, pursuant to New York Election Law section 6-164, an opportunity to ballot petition need only be submitted in order to convert an uncontested primary into a contested one. Petitioner further alleged that the voting machines used by the City Board were defective, because the paper rolls jammed in the machine.

Simultaneously, petitioner moved for a preliminary injunction and temporary restraining order, enjoining the City Board to only use ballots and voting machines that permit write-in voting in the 2000 primary election.

On August 23, 2000, this matter was transferred to the Southern District of New York. On August 24, 2000, the Southern District denied petitioner's motion.

Following the City Board's January 2001 concession that its earlier interpretation of the New York Election Law regarding write-in votes in primary elections was incorrect, petitioner filed a Corrected Second Amended

Complaint in May 2001 (A61-A71).[1] The amended complaint simply substituted a new name for one of the City Board defendants.

(2)

In May 2003, the City Board moved for summary judgment. Thereafter, in February 2004, before the motion was ruled upon, petitioner moved for a "mandatory injunction" requiring the City Board to count at the polls all write-in votes cast in all primary and general elections starting with the September 2004 primary. Petitioner maintained that the City Board counted the write-in votes several days later, a practice inconsistent with New York Election Law section 9-102 as it existed in 2001, thus violating the Equal Protection Clause.

(3)

The District Court Decisions

(a)

On August 5, 2004, in a 9-page Report and Recommendation to United States District Court Judge George Daniels, Southern District Magistrate Judge Douglas Eaton recommended that petitioner's motion for an injunction be denied. The Magistrate Judge noted that, in 2001, the New York State Legislature enacted, and continues to do so each year, an amended version of the statute in question, each effective for one year, which permits the City Board, among others, to choose when it will count the write-in votes, up to 15 days after the voting. The Magistrate Judge ruled that, since the New York Election Law gave all local boards of elections throughout

[1] Unless otherwise indicated, numbers in parentheses preceded by the letter "A" refer to pages in Petitioner's Appendix.

New York State the same alternatives regarding when to count write-in votes, and, thus, any delay in the voting would affect everyone equally, the Equal Protection Clause was not violated. Therefore, petitioner could not demonstrate irreparable harm to obtain such an injunction.

In addition, the Magistrate Judge found that petitioner could not demonstrate a substantial likelihood of success on the merits, in that he failed to show an intentional effort on the part of the City Board to discriminate against him and other write-in voters or write-in candidates.

(b)

Thereafter, on August 12, 2004, in an extensive 37-page Report and Recommendation, Magistrate Judge Eaton recommended to Southern District Court Judge Daniels that the City Board's motion for summary judgment be granted and petitioner's complaint dismissed (A20-A54).

As to petitioner's Equal Protection claims against the City Board, the Magistrate Judge found that petitioner failed to demonstrate that the City Board's conduct was purposeful in the sense that it intended to discriminate against petitioner (A30-A31). Specifically, the Magistrate Judge found that petitioner's evidence that the City Board deliberately did not provide write-in voting was insufficient (A31-A32). The Magistrate noted that the City Board presented non-discriminatory reasons for its conduct: (1) prior to petitioner, no one had ever objected to the City Board's practice; (2) the City's voting machines purchased in 1959 had various limitations, which Governor George Pataki mentioned in his 2001 Approval Memorandum as valid reasons for the amendments to two sections of the New York Election Law that now provide for write-in votes in contested primaries but permit the City Board to delay counting those votes; and (3) the City Board determined in 1994 that the New York Election Law

regarding write-in voting in primary elections was ambiguous (A32). The Magistrate opined that petitioner's evidence that tended to show that there was a discrepancy between the City and State Board's practices and interpretations of the law was not relevant, since the discrepancy was always known and never in dispute; the evidence needed to show that the discrepancy had a purposeful, discriminatory effect, which petitioner failed to show (A32-A35).

As to petitioner's Due Process claim against the City Board, the Magistrate Judge found that petitioner failed to demonstrate a triable issue of fact that the City Board acted with the intent to deprive him or others of a constitutional right and that there was pervasive unfairness and inadequate state remedies (A42-A43). Rather, the Magistrate found that petitioner only showed that there were "unintended irregularities" as a result of human error, which was insufficient (A42-A43).

In support of its position, the Magistrate Judge noted that the City Board offered the testimony of City Board Commissioner Douglas A. Kellner from the July 10, 2001 trial in *Gelb II*, which testimony demonstrated that, although the City Board eventually determined that its interpretation of the New York Election Law was erroneous, it was, at the time, rational and not designed to deprive anyone the right to vote (A36-A40). The Magistrate Judge found that petitioner did not dispute Kellner's testimony with any documentation or other evidence that tended to show that the City Board acted purposefully: neither a two-page excerpt from a manual describing the design of the City's voting machines nor the fact that paper ballots must be provided under the law when machines were inadequate (A40-A41). With respect to the latter, the Magistrate Judge found that the fact the City did not provide paper ballots did not create an inference of an intentional deprivation of a constitutional right (A41).

In addition, the Magistrate Judge noted that the interpretation of the New York Election Law was a matter of state law and that, in any event, the New York State Court of Appeals declined to rule on the legal correctness of the City Board's new interpretation, now in line with the State Board's (A42). The Magistrate further noted that a 42 U.S.C. section 1983 lawsuit is not a proper forum to adjudicate issues of state law (A42).

Finally, the Magistrate Judge, although unsure if he should take ancillary jurisdiction over petitioner's state-law claims, nonetheless found that petitioner's state-law claims of fraud and *ultra vires* were not actionable (A43-A44). In addition, the Magistrate concluded that petitioner was not entitled to punitive damages, because they are not recoverable against a municipality in a 42 U.S.C. section 1983 lawsuit and, as to the individual defendant Commissioners, petitioner could not recover such damages since he could not show their "evil motive, intent, recklessness or callous indifference" (A44-A45).

(c)

On August 18, 2004, petitioner filed written objections to the Report and Recommendation regarding the denial of his motion for an injunction. In an order dated January 3, 2005 (A17-A19), the Southern District (Daniels, U.S.D.J.) adopted the findings and recommendations of the Magistrate Judge.

On August 25, 2004, petitioner filed written objections to the Report and Recommendation regarding the grant of the City Board's motion for summary judgment. In an order entered January 31, 2005 (A55-A58), the Southern District (Daniels, U.S.D.J.) adopted the findings and recommendations of the Magistrate Judge and dismissed petitioner's complaint in its entirety.

On February 7, 2005, the aforementioned January 31, 2005 order was reduced to a judgment, from which petitioner appealed (A59-A60).

REASONS FOR DENYING THE PETITION

THE SECOND CIRCUIT'S THOROUGH AND WELL-REASONED DECISION AFFIRMING THE DISTRICT COURT'S ORDER AND JUDGMENT IS LEGALLY CORRECT AND DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT, ANOTHER COURT OF APPEALS OR OTHERWISE WARRANTS FURTHER REVIEW BY THIS COURT.

The Second Circuit correctly held that, as to petitioner's equal protection claim, the issue centers on a determination as to whether the actions of the City Board were intentional. The Second Circuit also correctly held that his equal protection claim failed, because he did not demonstrate that the City Board deliberately chose an erroneous interpretation of the New York Election Law for the purpose of discriminating against write-in voters.

However, petitioner erroneously believes that the City Board's intent to deprive him of a constitutional right is reflected by the Second Circuit's earlier 2000 decision in which it certified a question on the interpretation of the New York Election Law to the New York State Court of Appeals. 224 F.3d 149 (Cert. Petition, at p. 13). In so arguing, petitioner refers to the Second Court's *dictum* therein that, because of the City Board's repeated refusals to offer write-in voting in contested primary elections, "it may well be that the Board engaged in" intentional discrimination. However, petitioner misses the mark completely, neglects to read the Second Circuit's statement in the appropriate context and thereby fails to recognize that the Second Circuit was non-committal on the strength of petitioner's claims. In the sentence immediately following that which petitioner cites, the Second Circuit

acknowledged that there was still a possibility that the City Board could obtain summary judgment in its favor—"Although we do not foreclose the possibility of ultimate summary judgment in favor of the City Board . . . ." 224 F.3d at 157. Indeed, that is what eventually properly occurred here.

Moreover, petitioner makes much of the fact that the City Board did not acknowledge its purportedly erroneous interpretation of the New York Election Law regarding write-in voting in contested primary elections until 2001, despite the fact that, in 1995, then District Court Judge Sotomayor, in denying the City Board's abstention motion in *Gelb I*, noted that it appeared that the Election Law was not as ambiguous as the City Board claimed because of the plain language of the various statutes and because of an opinion by the New York State Attorney General. 888 F. Supp. at 517-520 (Cert. Petition, at p. 16). What petitioner fatally chooses to ignore, however, are the following.

First, as the Second Circuit correctly held here, an "[u]neven or erroneous application of an otherwise valid statute constitutes a denial of equal protection only if it represents 'intentional or purposeful discrimination' " (citations omitted). *Powell v. Power*, 436 F.2d 84, 88 (2d Cir., 1970). Petitioner cannot show such intentional or purposeful discrimination.

Second, despite Judge Sotomayor's foregoing analysis, she subsequently acknowledged in her 1996 decision ultimately granting the City Board summary judgment in *Gelb I* that "there is great uncertainty within state law as to whether a write-in option must be provided in a primary election." 950 F. Supp. at 85, n.3.

Third, in August 2000, the Second Circuit certified a question to the New York State Court of Appeals precisely because of that uncertainty, acknowledging that

there was "an absence of authoritative state court interpretations of the election statutes at issue here. . . ." 224 F. 3d at 157-158.

Finally, even when the City Board conceded that it believed its earlier interpretation of the Election Law was incorrect, the New York State Court of Appeals, in February 2001, did not pass on the legal correctness of that view when it declined to answer the Second Circuit's certified question.

Therefore, contrary to petitioner's contentions, in light of the ambiguity in the Election Law recognized by the Second Circuit and the District Court, and the lack of any ruling on the City Board's interpretation of the law by the New York State Court of Appeals, it cannot be said that the City Board's interpretation of the write-in provisions of the Election Law pertaining to primary elections prior to 2001 was arbitrary, irrational and undertaken with the intent to discriminate against petitioner.

Finally, in light of the foregoing demonstrating that petitioner could not demonstrate intentional discrimination, the Second Circuit properly affirmed the denial of petitioner's claim for injunctive relief. Petitioner could not demonstrate irreparable harm and a likelihood of success on the merits of his lawsuit against the City Board.

Therefore, the Second Circuit's cogent rejection of petitioner's equal protection and due process claims is correct in all respects and does not raise any issues warranting further review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
March 28, 2006

Respectfully submitted,

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(3)

FILED
APR 8 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05 - 1161

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IRVING A. GELB,

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v.

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and

The New York State Board of Elections, et al

Respondents

On Petition for Writ Of Certiorari
To The Second Circuit Court Of Appeals

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The decision of the Second Circuit should not be allowed to stand, because it incorrectly affirms the District Court opinion that relied Magistrate's Report and Recommendation which, among other things, failed to address the "color of law" issue at the core of this 42 § 1983 complaint. The decision of the Second Circuit conflicts with several of this Court's decisions.

There are two sets of respondents. We will address the issues concerning the New York City Board of Elections and its commissioners (the "City Board") in Part A, below and the issues concerning the New York State Board of Elections and its commissioners (the "State Board") in Part B, below.

Part A: THE CITY BOARD

I. THE COURT SHOULD CLARIFY THE STANDARD FOR DETERMINING AN EQUAL PROTECTION VIOLATION.

In denying petitioner's Equal Protection claim, the Second Circuit states:

> "Uneven or erroneous application of an otherwise valid statute constitutes a denial of equal protection only if it represents 'intentional or purposeful discrimination.'" *Powell v. Power*, 436 F.2d 84, 88 (2d Cir. 1970) (quoting *Snowden v. Hughes*, 321 U.S. 1,8 (1944). (A3)

While *Powell* provides one criteria for determining an equal protection violation, it is not the only criteria.

In *EVANS v. CORNMAN*, 398 U.S. 419, (1970), this

Court has disallowed voting distinctions based upon various classifications including geography.

It can be shown that in the contested September 2000 Democratic Primary for U.S. Senator, the City Board knew that all petitions for statewide primaries are filed with the State Board and not with the City Board and the City Board knew that in the primary in question, the State Board did not require an opportunity to ballot petition prior to permitting write-in voting. The City Board had no legal authority to insist that an opportunity to ballot petition needed to be filed before write-in voting can be offered in that primary.

This Court needs to determine whether an equal protection violation has occurred in the contested September 2000 Democratic Primary for U.S. Senator when voters outside New York City were permitted to vote by write-in while voters within New York City were not. And whether an equal protection violation has occurred when petitioner was permitted to run as a write-in candidate in the contested September 2000 Democratic Primary for U.S. Senator in districts outsaide of New York City while being denied that right within New York City.

II. THE COURT SHOULD CLARIFY THE STANDARD FOR DETERMINING WHETHER DAMAGES ARE RECOVERABLE AGAINST MUNICIPALITIES AND PUBLIC OFFICIALS FOR VIOLATIONS COMMITTED UNDER 42 § 1983

On page 13, Respondent City Board says

> "the Magistrate opined that petitioner's evidence that tended to show that there was a discrepency between the City and State Board's practices and interpretations of the law was not relevant, since the discrepancy was always known and never in dispute;

the evidence needed to show that the discrepency had a purposful, discriminatory effect, which petitioner failed to show (A32-A35)."

The Court misapprehends the significance of the evidence.

It is precisley because the discrepency between the City and State Board's practices and interpretations of the law was always known and not in dispute, that the evidence shows that the discrepency had a purposful, discriminatory effect. By saying that the discrepancy was always known and not in dispute, the Court is saying that at the time I initiated my action, the City Board knew that all petitions for the September 2000 Democratic Primary for U.S. Senator were filed with the State Board and they also knew that the State Board did not require the opportunity to ballot petition the City Board insisted was necessary.

An *Ultra Vires* act of a municipality is one which is beyond the powers conferred upon it by law. *Charles v. Town of Jeanette, Inc.* La. App., 234 So 2d 794,798. The City Board had no legal authority to make any determination regarding write-in voting in a statewide primary. Clearly, the City Board was acting under color of law.

In *Monell v. Department of Social Services*, 436 U.S. 658, 98 Sup.Ct. 2018 (1978), the Supreme Court found that municipalities and public officials can be held accountable under 42 § 1983 for constitutional rights violations resulting from the department's official policy. In my case, my right to participate in the September 2000 Democratic Primary for U.S. Senate as a write-in candidate and a write-in voter were violated by the official policy set by both the City Board with its commissioners and the State Board with its commissioners.

In *Pembaur v. City of Cincinnati,* 106 Sup.Ct. 1292, 1300 (1986), the Supreme Court found that liability under 42 §

1983 could be imposed on officials who were responsible for establishing the "final" official policy with respect to the activity in question. The Court noted that municipal liability under Section 1983 attaches when a deliberate choice to follow a course of action is made from among from various alternatives by the officials responsible for setting final policy with respect to the subject matter in question. *Pembaur* is also significant because it shows that liability can attach to even a single decision to take unlawful action in accordance with official policy set by even a single policy maker.

REASONS FOR GRANTING PETITION

THE SECOND CIRCUIT'S DECISION AFFIRMING THE DISTRICT COURT'S ORDER AND JUDGMENT WARRANTS REVIEW BY THIS COURT BECAUSE IT CONFLICTS WITH DECISIONS BY THIS COURT AND OTHER APPEALS COURT DECISIONS.

(a)

In *Williams v. Salerno*, 792 F.2d. 323, 326 (2d Cir. 1986), the Second Circuit had found that irreparable harm is established if a party is deprived of the right to vote (noting that the plaintiffs "would certainly suffer irreparable harm if their right to vote were impinged upon"). In addition to having been denied my legal right to vote by write-in, we were also denied our right to participate as a candidate. While the defendants admitted, in 2001, that their interpretation of relevant election law had been wrong for over 40 years, the harm had been done and cannot be undone.

In *Monell*, the Supreme Court found that municipalities and public officials can be held accountable under 42 § 1983 for constitutional rights violations resulting from the

department's official policy.

In *Pembaur*, the Supreme Court found that liability under 42 § 1983 could be imposed on officials who were responsible for establishing the "final" official policy with respect to the activity in question.

(b)

On page 15 of City Respondents' Brief, in discussing the Second circuit's earlier 2000, respondents implies that petitioner misunderstood the import of that decision. They state

> "In the sentence immediately following that which petitioner cites, the Second Circuit acknowledged that there was still a possibility that the City Board could obtain summary judgment in its favor--- 'Although we do not forclose the possibility of ultimate summary judgment in favor of the City Board....' 224 F.3d at 157. Indeed, that is what eventually properly occurred here."

The concluding sentance in the statement above is false and misleading. This can be seen by simply turning to City Respondents' Brief, page 9. There, in a short discussion of the sequence of events following New York State Court of Appeals declining to answer the certified question from the Second Circuit, respondents state:

> "...the Second Circuit vacated the District Court's grant of summary judgment and remanded the matter for the District Court to determine whether the City Board engaged in 'intentional or purposeful discrimination.' 7 Fed. Appx. 97, 2001 U.S. App. LEXIS 5647(2001)."
>
> "Upon remand, the matter proceeded to trial on July 10 and July 11, 2001, which resulted in a jury verdict in favor of the City Board. 47 Fed. Appx. 10, 2002

U.S. App. LEXIS 18688 at *2. The jury found that petitioner failed to prove that the City Board had intentionally discriminated against him by not offering write-in voting in the September 1997 Democratic Party primary election."

The significance here, is not that I lost the trial, but rather that we were permitted, contrary to City Respondents' statement on page 15, to proceed to trial. Clearly, my current action is stronger than my earlier action because I can now show that City Board respondents had no right to make even an erroneous determination. We feel that our current action should likewise be allowed to proceed to trial.

(c)

City respondents, on page 17, continue to try to confuse the issue by claiming that even though they admitted in 2001 that their interpretation of relevant election law had been wrong for over 40 years, the issue remains ambiguous because the New York State Court of Appeals declined to answer the certified question sent by the Second Circuit. They claim that absent a ruling from the State Court of Appeals,

"...it cannot be said that the City Board's interpretation of the write-in provisions of the Election Law pertaining to primary elections prior to the 2001 was arbitrary, irrational and undertaken with the intent to discriminate against petitioner."

They are wrong.

The New York State Court of Appeals would have been remiss in its judicial duties had they declined to address the certified question if an answer were not available. We suggest a simpler explanation. When the City Board admitted its position was wrong, the question simply became moot. A

question is "moot" when it presents no actual controversy or when the issues have ceased to exist. *Matter of Lawson Estate*, 41 Ill.App.3d 37, 353 N.E. 2d 345, 347.

It can be shown that the City Board's interpretation of the write-in provisions of the Election Law pertaining to the primary election for U.S. Senate in 2000 was arbitrary, irrational and undertaken with the intent to discriminate against petitioner because it can be shown that they had no authority to make any determination at least in that primary election.

Further, when the respondents state, on page 17, that "Petitioner could not irreparable harm and a likelihood of success on the merits of his lawsuit against the City Board." They are wrong again. As we previously pointed out, the Second Circuit had already set the standard for irreparable harm when in *Williams v. Salerno*, 792 F.2d. 323, 326 (2d Cir. 1986), the Second Circuit had found that irreparable harm is established if a party is deprived of the right to vote (noting that the plaintiffs "would certainly suffer irreparable harm if their right to vote were impinged upon").

Clearly, further review by this Court is warranted.

Part B: THE STATE BOARD

It is not repeat all the arguments in our Petition for Writ of Certiorari as relates to the State Board. We are however, compelled to point out that the State Board has admitted that they are obligated to administer primary elections for statewide office. And they have admitted that they did not require an opportunity to ballot petition before providing write-in voting in contested statewide primaries.

We conceded only that the State is immune from damages because actions against the State Board for monetary damages

are barred under the Eleventh Amendment. *See Feingold v. New York*, 366 F.3d 138, 149(2d Cir.)"

The Commissioners, however, have no immunity because they were not acting on behalf of the State when under color of law, they supported the right of the City Board to interpret the relevant Election Law differently from the State Board in a statewide primary.

State officials can be sued for damages when acting in their "official capacity."*Hafer v. Melo* 112 Sup. Ct. 358 (1991) Further, in *Pembaur,* liability under Section 1983 attaches when a deliberate choice to follow a course of action is made from among from various alternatives by the officials responsible for setting final policy with respect to the subject matter in question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 7, 2006